



[Billing Code: 6750-01-S]

FEDERAL TRADE COMMISSION

Agency Information Collection Activities; Proposed Collection; Comment Request

AGENCY: Federal Trade Commission (“FTC” or “Commission”).

ACTION: Notice.

SUMMARY: The FTC seeks public comments on proposed information requests to marketers of electronic cigarettes. These comments will be considered before the Commission submits a request for Office of Management and Budget (“OMB”) review under the Paperwork Reduction Act (“PRA”) of compulsory process orders to those marketers. The information sought from those companies would include, among other things, data on annual sales and marketing expenditures. The Commission intends to ask OMB for a three-year clearance to collect this information.

DATES: Comments on the proposed information requests must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Interested parties may file a comment online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write: “Electronic Cigarettes: Paperwork Comment, FTC File No. P144504” on your comment and file the comment online at <https://ftcpublic.commentworks.com/ftc/electroniccigarettespra> by following the instructions on the web-based form. If you prefer to file your comment on paper, mail your comment to the

following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue, NW, Suite CC-5610 (Annex J), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street, SW, 5th Floor Suite 5610 (Annex J), Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be addressed to Elizabeth Sanger or Shira Modell, Division of Advertising Practices, Bureau of Consumer Protection, Federal Trade Commission. Telephone: (202) 326-2757 (Sanger) or (202) 326-3116 (Modell).

SUPPLEMENTARY INFORMATION:

Background: For many years, the Commission has published reports on sales and marketing expenditures by the major cigarette and smokeless tobacco manufacturers. The data contained in those reports are based on information submitted to the Commission, pursuant to compulsory process, by the largest domestic cigarette and smokeless tobacco manufacturers.

In the past few years, sales of battery-powered devices generally referred to as electronic cigarettes or “e-cigarettes” have grown rapidly in the United States. Rather than burn tobacco, these devices heat liquid containing flavorings and chemicals (usually including nicotine) to produce an aerosol that is inhaled, and then exhaled, by the user. E-cigarettes, which are sold both online and in brick-and-mortar stores, are available in both disposable and refillable models, in a range of nicotine strengths (including nicotine-free), and in a multitude of flavors;¹ some companies allow consumers to order individually-customized flavor and nicotine content combinations.

¹ Those flavors include tobacco and menthol, as well as fruits (e.g., green apple), beverages (e.g., coffee), desserts (e.g., turtle sundae), and others.

Given the increasing prevalence of e-cigarettes alongside conventional cigarettes and smokeless tobacco, the Commission believes it is necessary for the agency to begin collecting information from e-cigarette marketers about their sales and marketing activities. The Commission intends to publish a report with the data it obtains,² and to issue annual information requests to the major marketers, in order to track trends over time. The information will be sought using compulsory process under Section 6(b) of the Federal Trade Commission Act, 15 U.S.C. 46.

The Commission plans to address its information requests to the ultimate U.S. parent of e-cigarette marketers (“industry members”) in order to ensure that no relevant data from affiliated or subsidiary companies go unreported. The Commission intends to issue information requests to approximately five large and ten small industry members. Even though this number does not represent the entire industry, the responses should provide valuable information about a reasonable percentage of the e-cigarette market, including its major players. Because the number of separately incorporated companies affected by the Commission’s requests will exceed nine entities, the Commission intends to seek OMB clearance under the PRA before requesting any information from the industry members. Under the PRA, 44 U.S.C. 3501 – 3521, federal agencies must obtain approval from OMB for each “collection of information” they conduct or sponsor if posed to ten or more entities within any twelve-month period. 44 U.S.C. 3502(3); 5 CFR 1320.3(c). “Collection of information” means agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. 44 U.S.C. 3502(3); 5 CFR 1320.3(c). As required by section 3506(c)(2)(A) of the PRA, the FTC is

² The report would not disclose any company-specific confidential data.

providing this opportunity for public comment before requesting that OMB authorize the proposed collection of information.

The FTC invites comments on: (1) whether participation in the study is necessary, including whether the information will be practically useful; (2) the accuracy of our burden estimates, including whether the methodology and assumptions used are valid; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information.

The Commission anticipates that its requests will seek the following categories of information: (1) sales and give-aways of e-cigarettes and related products (e.g., refill cartridges and e-liquids); (2) marketing expenditures, including the amounts being spent on various media; (3) product placements in television programming, motion pictures, magazines, and other publications; (4) efforts such as age-screening mechanisms to prevent youth from being exposed to advertising and promotion for e-cigarettes or from obtaining free product samples; (5) expenditures on advertising to deter youth under the age of 18 from purchasing or using e-cigarettes; and (6) data collection activities, including data collection in connection with digital and social media marketing, and efforts to avoid collection of data from those under age 18. The Commission requests comments on its intention to seek the above-listed categories of information.

The Commission also invites comments on the following issues:

1. Should the FTC seek to collect data that are differentiated according to: (a) the various types of products sold and given away by industry members (e.g., collecting data on disposable devices separately from data on refillable devices and on refill supplies); (b) the various flavors and nicotine strengths of those sales and give-aways; (c) the various sizes and

liquid capacities of disposable e-cigarettes, cartridges, and e-liquids sold and given away; and (d) whether the company sells directly to consumers (e.g., over the Internet) or to wholesalers and distributors for subsequent sale to consumers (e.g., at convenience stores)? Would less detailed information be sufficient, and, if so, what level of detail will suffice, and why?

2. Should the Commission collect data on product sales separately from data on product give-aways?

3. If an e-cigarette is sold with more than one cartridge (or container of e-liquid), should all of those cartridges be considered part of the initial sale, or should some of them be considered refills? If some of them should be considered refills, which ones? Does it matter whether those cartridges are part of the same Stock Keeping Unit (“SKU”) as the e-cigarette device? Whether they are packaged with it in the same blister pack?

4. Should the Commission seek data on state-by-state sales of e-cigarettes and related products?

5. Is there other information the Commission should seek from the companies about sales and give-aways of their products?

6. Assuming that the Commission’s collection and reporting of highly detailed data is necessary for understanding the e-cigarette industry – e.g., which flavor and nicotine content combinations are sold the most in direct online transactions with consumers, and which are sold the most to wholesalers and retailers, and which products are most frequently given away – can industry members provide those data? In other words, can the companies provide data that distinguishes between: (a) direct sales to consumers (e.g., online sales) and sales to retailers and distributors; (b) sales and give-aways of disposable e-cigarettes and sales and give-aways of refillable e-cigarettes; and (c) the various combinations of sizes, flavors, and nicotine contents of

their e-cigarettes and refill cartridges and e-liquids? For example, can the companies report the volume and sales value of higher nicotine, menthol-flavored e-liquid sold to retailers and distributors separately from sales of lower nicotine, pizza-flavored e-liquid sold directly to consumers? Can they report the volume and sales value of higher nicotine, tobacco-flavored cartridges and e-liquids sold with an e-cigarette (i.e., in the same blister pack) separately from the volume and sales value of lower nicotine, dessert-flavored refill cartridges and e-liquids? Can the companies provide sales data on a state-by-state basis, and if so, can they do so for all sales or only for sales made directly to consumers?

7. Should the Commission collect data for each individual e-cigarette flavor sold by the companies, or should it identify various flavor categories (e.g., tobacco, fruit, dessert) for purposes of the companies' reports? If the Commission should use flavor categories, how should those categories be defined? Similarly, should the Commission collect data for every level of nicotine content sold by the companies, or should it identify various ranges of nicotine content (e.g., nicotine-free, from 1.8% to 2.4%); if the Commission should use ranges, what should they be?

Estimated hours burden: The FTC staff's estimate of the hours burden is based on the time that would be required to respond to the Commission's information request. The FTC currently anticipates sending information requests to as many as 15 e-cigarette companies each year. The Commission anticipates that these companies will vary in size, in the number of products they sell, and in the extent and variety of their advertising and promotion. Because of these variables, and the quick-changing nature of the industry at this point, FTC staff has not calculated separate burden estimates for large and small companies, as is otherwise traditionally the case for the Commission's cigarette and smokeless tobacco Orders. For example, an

e-cigarette marketer with a large volume of sales but a relatively small product line could potentially require fewer resources to respond to the Commission's Order than a marketer with lower overall sales but a substantially larger product line that offers consumers a greater range of flavor and nicotine options. Rather than account for each potential permutation of factors, FTC staff has calculated a per company average at the upper limit of this potential range. Some companies will likely require less time to compile their responses.

The Commission anticipates that even if it provides models for the Excel datafiles the companies will be required to submit, recipients of its Orders will need substantial time to prepare a response the first time. Once an e-cigarette marketer has prepared its first response to a Commission Order, however, it will need less time in subsequent years to prepare its reports because it will know what information it will be required to produce, and will already have a template for its submission.

Accordingly, as an approximation, staff assumes a per company average of 200 hours for each recipient of the Commission's information requests the first year they have to comply with the Commission's Order. Staff anticipates that in subsequent years, the per company average will be 150 hours. Thus, the overall estimated burden for 15 recipients of the information requests is 3,000 hours for the first year and 2,250 for each of the two subsequent years, or a total of 7,500 hours. Thus, the average yearly burden, over the course of a prospective three-year clearance, per recipient (large and small), is 167 hours (rounded to the nearest whole number). These estimates include any time spent by separately incorporated subsidiaries and other entities affiliated with the ultimate parent company that has received the information request.

Estimated cost burden: Commission staff cannot calculate with precision the labor costs associated with this data production, as they entail varying compensation levels of

management and/or support staff among companies of different sizes. The staff assumes that computer analysts and other non-legal staff will perform most of the work involved in responding to the Orders, although in-house legal personnel will be involved in reviewing the actual submission to the Commission. The staff believes that the same \$100/hour wage that it used in its recent request for reauthorization of information requests to the major cigarette and smokeless tobacco manufacturers is appropriate here also for the combined efforts of these individuals. Using this figure, staff's best estimate for the total labor costs for 15 information requests is \$300,000 (3,000 hours x \$100/hour) for the first year and \$225,000 for each of the two subsequent years (2,250 hours x \$100/hour), for a total of \$750,000 over the entire three-year period. Annualized, labor cost per respondent will average approximately \$16,700.

Staff believes that the capital or other non-labor costs associated with the information requests are minimal. Although the information requests may necessitate that industry members maintain the requested information provided to the Commission, they should already have in place the means to compile and maintain business records.

Request for comment: You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Write "Electronic Cigarettes: Paperwork Comment, FTC File No. P144504" on your comment. Your comment – including your name and your state – will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Website, at <http://www.ftc.gov/os/publiccomments.shtml>. As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on the Commission Website.

Because your comment will be made public, you are solely responsible for making sure that your comment doesn't include any sensitive personal information, such as anyone's Social Security number, date of birth, driver's license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, do not include any "[t]rade secret or any commercial or financial information which is . . . privileged or confidential," as discussed in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). In particular, do not include competitively sensitive information, such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names. If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you must follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c). Your comment will be kept confidential only if the FTC General Counsel grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online, or to send them to the Commission by courier or overnight service. To make sure that the Commission considers your online comment, you must file it at <https://ftcpublic.commentworks.com/ftc/electroniccigarettespra>, by following the instructions on the web-based form. If this Notice appears at <http://www.regulations.gov/#!home>, you also may file a comment through that website.

If you file your comment on paper, write “Electronic Cigarettes: Paperwork Comment, FTC File No. P114504” on your comment and on the envelope, and mail it to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue, NW, Suite CC-5610 (Annex J), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street, SW, 5th Floor, Suite 5610 (Annex J), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission website at <http://www.ftc.gov> to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. You can find more information, including routine uses permitted by the Privacy Act, in the Commission's privacy policy, at <http://www.ftc.gov/ftc/privacy.htm>.

By direction of the Commission.

Donald S. Clark,
Secretary.
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